

**CHAPTER 612**  
**CONSTRUCTION PROCUREMENT DESIGN-BUILD, DESIGN-BUILD-OPERATE-  
MAINTAIN & DESIGN-BUILD-FINANCE-OPERATE-MAINTAIN**

**PART SUB-CHAPTER 612.12**  
**ALTERNATIVE METHODS OF CONTRACT ADMINISTRATION PROJECT  
DELIVERY SELECTING THE DESIGN-BUILDER**  
**&**  
**COMPETITIVE SEALED PROPOSALS**  
(CM/~~Constructor~~, Design-Build, Guaranteed Energy Savings Contracts)

**6.2.3 AGENCY DETERMINATION & REQUEST FOR APPROVAL**

An Agency desiring to use alternative methods of contract administration must determine in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the State. The determination must also meet the requirements of SC Reg. 19 445.2145(A) and set forth in Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003). The Agency will find the Sloan decision posted on MMO's Web site at <http://www.mmo.sc.gov/MMO/legal/DDP/decisions/>. Under Sloan, the determination must fulfill two purposes:

1. It must effectively inform the State Engineer and, by extension, the Budget & Control Board, why the selected method of contract administration works to the Agency's best advantage for the project at issue, and
2. It must provide the citizens of South Carolina a window into the Agency's "decision-making process—safeguarding the quality and integrity of the contract awards through public accountability."

"If the written determination provides sufficient factual grounds and reasoning for the ... public to make an informed, objective review of these decisions, then it has accomplished its purpose." Sloan.

The Agency must submit the written determination signed by the Agency Head or his designee to the State Engineer along with a request to use the alternative method.<sup>1</sup> The State Engineer has ten days to review and determine his position with respect to the proposed method. If the State Engineer disagrees with the agency, the State Engineer shall provide written notification to the Board and the agency stating the reasons for contesting the selected method. The Board shall make the final decision as to the approved method of construction contracting.

**6.2.512.1.1 DESIGN-BUILD – SC Code Ann 11-35-2910(7), (8), (9), (10), & (11)**

**A. DEFINITIONS**

1. "Design-build" is a project delivery method in which the Agency enters into a single contract for design and construction of an infrastructure facility. Design-build may include bundling additional services into a single contract. For purposes of the following portions of this Sub-Chapter, the term "design-build" includes permutations such as the following:

- a. Design-build finance: A project delivery method in which the Agency enters into a single contract for design, construction, and financing of an infrastructure facility Guaranteed energy, water, and wastewater savings projects.

<sup>1</sup> As used throughout this chapter, the term "Agency Head" includes any individual designated by the Agency Head to fulfill his duties.



b. Design-build-operate-maintain: A project delivery method in which the Agency enters into a single contract for design, construction, maintenance, and operation of an infrastructure facility over a contractually defined period.

c. Design-build-finance-operate-maintain: A project delivery method in which the Agency enters into a single contract for design, construction, finance, maintenance, and operation of an infrastructure facility over a contractually defined period.

2. "Design requirements" are the written requirements of the infrastructure facility the Agency intends to procure using design-build, including:

- a. The features, functions, characteristics, qualities, and properties that the Agency and State require;
- b. The anticipated schedule, including start, duration, and completion; and
- c. The budgets, as applicable to the specific procurement, for design, construction, operation, and maintenance.

The design requirements may, but need not, include drawings and other documents illustrating the scale and relationship of the features, functions, and characteristics of the project. Unless the Agency has the professional staff necessary to prepare the design requirements, it should hire a design professional to do so using the qualification based selection process set forth in Chapter 4 of this Manual.

3. "Independent peer reviewer services" are additional architectural and engineering services that an Agency must acquire, except as otherwise provided in this Manual, in procurement of design-build services, design-build-operate-maintain, or design-build-finance-operate-maintain procurements. The function of the independent peer reviewer is to confirm that the key elements of the professional engineering and architectural design provided by the contractor are in conformance with the applicable standard of care. If an Agency body elects not to contract with the independent peer reviewer proposed by the successful offeror, the Agency must select the independent peer reviewer through qualifications based selection in accordance with Chapter 4 of this Manual.

#### B. REQUIRED EVALUATION FACTORS—SC Code Ann. §§ 11-35-3024(3) and Regs 19-445.2145(K)

When an Agency is conducting a design-build procurement, it must use the following evaluation factors in the RFP:

1. Demonstrated compliance with the design requirements;
2. Offeror qualifications;
3. Financial capacity;
4. Project schedule;
5. Price, or, for design-build-operate-maintain or design-build-finance-operate-maintain, life-cycle price;
6. Competence and qualifications of offerors proposed independent peer reviewer;
7. Other factors, if any.

#### C. PROJECTS EXEMPTED FROM THE REQUIREMENT FOR AN INDEPENDENT PEER REVIEWER—SC Code Ann. §§ 11-35-2910(11), 3024(3)(b), and Regulation 1-445.2145(A)(7)

~~An Agency must retain an independent peer reviewer on each design build project unless excused by the State Engineer. If the Agency desires to forego an independent peer reviewer, the Agency must submit to the State Engineer a written determination that considering the nature, size, and scope of the project, the Agency has personnel on staff qualified to perform the functions of the independent peer reviewer. The Agency must include the qualifications of the personnel who will perform the functions of the independent peer reviewer. The State Engineer will within 10 days of receipt of the Agency's determination, notify the Agency of his determination, in writing, whether to allow the Agency to forego an independent peer reviewer.~~

#### D. LICENSING AND BONDING REQUIREMENTS FOR DESIGN BUILDERS—SC Code Ann. §§ 40-11-10 et seq., §§ 11-35-3010 & 3037 and Regs 19-445.2145(C)

The design builder must comply with all licensing requirements of the SC Department of Labor, Licensing and Regulation. The design builder must provide a performance bond and a material and labor payment bond, both for 100% of the cost of design and construction.



~~The Agency may require one or more of the following forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately or as one element of another project delivery method:~~

- ~~1. Operations period surety bonds that secure the performance of the contractor's operations and maintenance obligations;~~
- ~~2. Letters of credit in an amount appropriate to cover the cost to the governmental body of preventing infrastructure service interruptions for a period up to twelve months; and~~
- ~~3. Appropriate written guarantees from the contractor, or depending upon the circumstances, from a parent corporation, to secure the recovery of re procurement costs to the governmental body if the contractor defaults in performance."~~

#### **6.2.612.1.2 OPERATIONS MAINTENANCE – SC Code Ann § 11-35-2910(13)**

"Operations and Maintenance" is a project delivery method in which the Agency enters into a single contract for the routine operation, routine repair, and routine maintenance of an infrastructure facility.

#### **6.2.712.1.3 GUARANTEED ENERGY, WATER, OR WASTEWATER SAVINGS CONTRACTS - SC Code Ann § 48-52-670**

"Guaranteed energy, water, or wastewater savings contract" are design-build contracts for the evaluation and recommendation of energy, water, or wastewater conservation measures and for implementation of one or more of these measures. Such contracts must often include financing by providing that all payments to the contractor (except obligations on termination of the contract before its expiration) must will be made over time and the cost savings or billable revenue increases resulting from implementation of the energy, water, or wastewater conservation measures may will be used to make payments for the energy, water, or wastewater conservation systems installed pursuant to the contract. This is in essence a design-build-finance arrangement. The Agency must procure such contracts using the Request for Proposal process. See SC Code Ann § 48-52-670(B) and § 11-35-3015.

The State Energy Office publishes two guides for Public entities to use in Performance Contracting, the [Guide to Performance Contracting](#) and the [Performance Contracting Manual](#). An Agency may view the State Energy Office's Web site at <http://www.energy.sc.gov/index.aspx?m=7&t=48&h=182>.

#### **12.1.4 SOURCE SELECTION METHOD - SC Code Ann § 11-35-3015(5), (6), & (7) and Chapter 2.1**

The Procurement Code provides that the design-builder must be selected using competitive sealed proposals. The competitive sealed proposal source selection method is referred to throughout this document as the Request for Proposal (RFP) process.

#### **6.2.812.1.5 ORGANIZATIONAL STRUCTURE AND STAFFING FOR CONDUCTING THE RFP PROCESS – SC Code Ann §§ 3024(4) and Regs 19-445.2095(G)**

##### **A. ORGANIZATIONAL STRUCTURE**

~~The organization consists of a selection committee to evaluate the proposals and a final approval authority (the Agency Head or a designee). The Selection Committee is composed of a non-voting Chair appointed by the State Engineer, and Agency appointed voting and non-voting members as set forth in Part C below. the Agency Project Manager, and technical members appointed by the Agency. The number of technical members appointed for a particular procurement depends upon the circumstances of the procurement (e.g., types of expertise needed and number of proposals anticipated).~~

The Selection Committee assists the Agency Project Manager in developing the Selection Plan, and for evaluating proposals in accordance with the Plan and the RFP. The Selection Committee is also responsible for the preparation of report(s) on the evaluation results. The Selection Committee reports to the individual with the responsibility for final Agency approval of the selection.

##### **B. SPECIFIC RESPONSIBILITIES**

1. Agency Head or his/her designee: The Agency Head, acting as the final selection authority, is responsible for the



following:

- a. Directing the Agency's efforts during the entire source selection process.
- b. Reviewing and approving of the Selection Plan and the Request for Proposals (RFP).
- c. Appointing the members of the Selection Committee, other than the Chair (OSE must concur with the proposed Committee membership).
- d. Reviewing and approving the schedule of all actions required from receipt of proposals to signing of the contract.
- e. Providing the Selection Committee with appropriate guidance and special instructions as may be necessary for conducting the evaluation and selection process including approving the evaluation factors and weights assigned.
- ~~f. Reviewing and approving the Selection Committee's competitive range determination, if any.~~
- gf. Reviewing and approving the Selection Committee's final report and selection. The Agency Head may choose to reject the Committee's choice, but such action will require a new procurement.

2. Agency Project Manager: Subject to the policies and procedures of a specific agency, the Project Manager is responsible for the following:

- a. Preparing and submitting a draft of the Selection Plan to the Selection Committee for its review.
- b. Preparing and submitting the final Plan to the Agency Head and the Office of State Engineer for approval.
- c. Preparing the Request for Proposals, with the assistance of program and/or technical personnel.
- d. Coordinating with the Selection Committee, the Agency Head, and the OSE on the preparation and issuance of the RFP.
- e. Issuing any amendments to the RFP in conjunction with the OSE.
- f. Conducting pre-proposal conferences in accordance with established procedures.
- g. Preparing South Carolina Business Opportunities (SCBO) announcements.
- h. Safeguarding classified or other sensitive materials, including proposals and amendments.
- i. Conducting or coordinating cost or price analyses and documenting the results.
- j. Participating as a voting member of the Selection Committee.
- k. Promptly notifying all offerors eliminated from the competition.
- l. Determining contractor responsibility.
- m. Conducting or controlling all discussions and negotiations with offerors.
- n. Maintaining written records of all discussions and negotiations with offerors.
- ~~no.~~ Requesting best and final offers.
- p. Preparing the Selection Committee's report and recommendation to the Agency Head.
- og. Taking all necessary contractual actions.
- pf. Conducting the debriefing of unsuccessful offerors.

3. Selection Committee Chair: The Selection Committee Chair is a non-voting member appointed by the State Engineer. The Committee Chair's duties include the following:

- a. Scheduling and conducting Committee meetings and deliberations.
- b. Providing overall supervision, planning direction, and execution of the Committee's activities.
- c. Completing the Committee's responsibilities within the prescribed period established in the Agency Plan.
- d. Making final determinations of responsiveness on individual proposals.
- e. Approving all competitive range determinations. The Chair may add offerors to the competitive range, but shall not remove them except for reasons of non-responsiveness.
- f. Supporting the Agency Head to the fullest extent possible by conducting intermittent in-process reviews as required.
- g. Summarizing the raw evaluation data.
- h. Assisting the Agency Project Manager in debriefings to the extent requested.

### C. COMMITTEE MEMBERSHIP

The Selection Committee ~~must~~ should be composed of State employees. For the purposes of selection, members of Agency Boards, acting in their official capacity, are State employees. The Committee should be comprised of a



minimum of five voting members. The State Engineer must concur in all RFP selection committee appointments. Committee members must sign nondisclosure and conflict of interest statements. For large projects (\$5 million or more), the Agency appointed members should consist of:

1. One member of the board or commission, if any, governing the Agency or a designee of such board or commission;
2. The agency head (secretary, executive director, president, or like officer) or his designee;
3. One representative of the division, department, or program for which the project is being built;
4. Agency project manager; and
5. Agency facilities director or his designee.

If different than any of the above, the Agency may appoint the following additional members as either voting or non-voting members or as technical advisors:

1. Agency construction director or his designee; Finance VP or other financial expert;
2. Agency engineering and planning director or his designee;
3. Agency physical plant director or his designee; and
4. Other Agency technical staff as appropriate to the project.

\* Note: Normally, the Agency will appoint technical members with expertise in various aspects of the project. The number of technical members appointed for a particular procurement depends upon the circumstances of the procurement (e.g., types of expertise needed and number of proposals anticipated).

#### D. TECHNICAL ADVISORS

The Agency Head ~~may~~<sup>should</sup> appoint outside technical advisors with special expertise not available on the Selection Committee but ~~considered~~ essential to the selection process. Advisors must sign nondisclosure and conflict of interest statements. The Agency should use Advisors in discrete areas such as reviewing technical aspects of proposals to assure compliance with the technical requirements of the RFP. The Agency should not give Advisors access to information concerning overall Committee activities and should not attend Committee meetings unless specifically requested by the Committee Chair.

#### E. CHANGES IN SELECTION COMMITTEE MEMBERSHIP

An Agency may only make changes in the makeup of the selection committee with the approval of the Agency Head and the OSE.

#### 12.1.6 CONFLICTS OF INTEREST – SC Code Ann §§ 8-13-700, 725, 760, & 775

Using Form SE-214 (Selection Committee Confidentiality and Conflict of Interest Policy), the Chair of the Selection Committee must instruct the committee members and technical advisors of the Procurement Code's requirements for ethical conduct, and require each member to sign a statement that he has read and understands those standards of conduct and that he does not have an actual or apparent conflict of interest relating to the proposed acquisition. If an evaluator has an actual or apparent conflict of interest related to a proposal under evaluation, the Chair must remove that evaluator and, if a sufficient number of evaluators do not remain, replace him with another.

#### 6.2.912.1.7 SELECTION PLAN FOR THE RFP PROCESS

##### A. DEFINITION

The Selection Plan (Plan) is the document that explains how the Agency will solicit statements of qualifications and proposals from contractors and evaluate those statements and proposals in order to make the selection decision. It outlines how the Agency will conduct negotiations. It identifies who will do the evaluating (i.e., it identifies the Chair and members of the Committee). The Plan establishes milestone dates for the completion of the selection process. The Plan is, in short, the Agency's statement to itself and to others as to how it intends to acquire what it needs. It distinguishes what is important from what is not and, by assigning weights, defines how important these distinctions are.



Note: If the Agency, in its OSE approved written determination of project delivery method (see Chapter 2, Sub-Chapters 2. and 2. ) determined pre-qualify offerors pursuant to SC Code Ann § 11-35-3023(A), the Agency will need to include in its Selection Plan an outline of how it intends to prequalify offerors.

## **B. MINIMUM REQUIREMENTS**

The Plan must include the following, as a minimum:

1. Description of property or services to be acquired.
2. Description of Committee structure and the duties and responsibilities of each element of the organization. Include the nominations for Committee by attaching a roster of personnel by name, title, and agency to the plan.
3. Schedules and agenda for the Committee and key events or milestones that will occur between the time the Selection Committee is organized and its adjournment
4. Proposed pre-solicitation activities such as the issuance of a draft solicitation or convening a pre-solicitation conference or pre-proposal conference.
5. Solicitation plan (i.e. advertising plan).
6. Summary of the acquisition strategy including an explanation of the type of contract to be used, the proposed contract form, and the nature of any special features to be included in the contract.
7. Statement of the proposed evaluation factors and their relative importance.
8. Description of the evaluation process, methodology, and techniques including an explanation of the approach to selection.
9. Description, for "in-house" use, of the methodology that evaluators will use to express their judgment of the degree of merit each proposal possesses in relation to the announced evaluation factors including the scoring system the committee will use in the evaluation.
10. Schedule of significant milestones.
1. A description of the organizational structure;
2. A description of the proposed pre-solicitation activities;
3. A description of solicitation plan
34. A summary of the acquisition strategy, including any project-specific modifications to the State's standard contract forms, terms, and conditions;
45. A statement of the proposed evaluation factors and their relative importance;
56. A description of the evaluation process and selection methodology and techniques the Agency will use;  
and
67. A schedule of significant milestones.

## **C. PREPARATION AND APPROVAL OF THE PLAN**

The Project Manager prepares the Plan with the assistance of the responsible program and technical officials. The Committee must review the plan and the Agency Head and the OSE must approve the final plan before the Agency issues the a solicitation or holds any pre-solicitation conference.

## **D. SOLICITATION PLAN – SC Code Ann § 11-35-1530(2)**

The Consolidated Procurement Code requires adequate public notice of the invitation for bids. This notice (advertisement) must include publication in South Carolina Business Opportunities (SCBO). However, the Procurement Code recognizes that this alone may not constitute adequate public notice. This is especially the case for unique projects such as design-build-finance operate-maintain projects. Therefore, the Agency needs to develop a solicitation plan that provides adequate public notice for real competition on the project at hand. The plan must describe how the Agency will advertise for proposals (or in the case of prequalification, statements of qualification) and/or how the Agency intends to develop interest in the project other than through advertising in SCBO. The plan must also set forth the minimum number of days that the Agency will advertise the project.

## **PRINCIPAL ELEMENTS OF THE SELECTION PLAN**

The following are the principal elements the Agency must consider in the development of each Plan:

1. Description of property or services to be acquired.
2. Description of Committee structure and the duties and responsibilities of each element of the organization. Include the nominations for Committee by attaching a roster of personnel by name, title, and agency to the plan.



- ~~3. Schedules and agenda for the Committee and key events or milestones that will occur between the time the Selection Committee is organized and its adjournment~~
- ~~4. Proposed pre-solicitation activities such as the issuance of a draft solicitation or convening a pre-solicitation conference or pre-proposal conference.~~
- ~~5. Solicitation plan (i.e. advertising plan).~~
- ~~56. Summary of the acquisition strategy including an explanation of the type of contract to be used, the proposed contract form, and the nature of any special features to be included in the contract.~~
- ~~67. Statement of the proposed evaluation factors and their relative importance.~~
- ~~78. Description of the evaluation process, methodology, and techniques including an explanation of the approach to selection.~~
- ~~82. Description, for "in house" use, of the methodology that evaluators will use to express their judgment of the degree of merit each proposal possesses in relation to the announced evaluation factors including the scoring system the committee will use in the evaluation.~~
910. Schedule of significant milestones.

#### **12.1.8 PRE-QUALIFICATION - THE REQUEST FOR PROPOSAL (RFP) STATEMENTS OF QUALIFICATION**

When the Agency selection plan provides for short listing of design-builders through pre-qualification and OSE has approved pre-qualification, the Agency, under OSE's supervision, must follow the procedures set forth in the OSE Design-Builder Pre-Qualification Handbook to pre-qualifying bidders.

#### **6.2.10 12.1.9 THE REQUEST FOR PROPOSAL (RFP)**

##### **A. THE SOLICITATION**

The Agency must prepare a solicitation that will clearly communicate to the offerors both the Agency's needs and the evaluation factors the Selection Committee will use in the evaluating the proposals. The solicitation should not include the Plan. The solicitation must:

1. Advise prospective offerors on how their proposals should be organized and arranged.
2. Provide that offerors must submit the technical and price or cost portions of their proposals in separate sealed envelopes.
3. Inform offerors of the evaluation factors for award and information on the source selection system the Agency will employ including a statement of all significant factors and sub-factors (including price) which the agency reasonably expects to consider in evaluating proposals and the relative importance assigned to each of these factors.
4. Inform offerors of minimum requirements that apply to particular evaluation factors and significant sub-factors.

**B. THE SOLICITATION: ADDITIONAL REQUIREMENTS FOR DESIGN-BUILD – SC Code Ann § 11-35-3024**  
For a design-build project, an Agency solicitation, in addition to the requirements of Part 6.2.10 12.1.7(A) above must:

1. ~~Must i~~ Include the Agency's design requirements;
2. ~~Must s~~ Solicit proposal development documents;
3. If the Agency determines the cost of preparing proposals is high in view of the size, estimated price, and complexity of the procurement, may:
  - a. Provide for pre-qualification of offerors in accordance with SC Code Ann § 11-35-3023;
  - b. Provide for short-listing of responsive and responsible offerors determined to be reasonably susceptible of being selected for award before discussions and evaluations pursuant to SC Code § 11-35-1530 provided:
    - i. The RFP states the number of proposals the Agency will short-list, and
    - ii. The Agency gives prompt public notice of which proposals it short-lists.
  - c. Provide for the payment of stipends to unsuccessful offerors if:
    - i. The RFP includes the amount of the stipend, and
    - ii. The RFP includes the terms under which the Agency will pay stipends.



4. In addition to any other evaluation factors, must include the relative importance of the following required evaluation factors:
- a. Demonstrated compliance with the design requirements;
  - b. Offeror qualifications;
  - c. Financial capacity;
  - d. Project schedule;
  - e. price, or, for design-build- operate-maintain or design-build-finance-operate-maintain, life-cycle price; and
  - f. Competence and qualifications of offerors proposed independent peer reviewer if the offeror is required to provide a peer reviewer as a part of its proposal.
5. Must require each offeror to identify an independent peer reviewer; unless the Agency plans to directly hire an independent peer reviewer using the procedures for procuring professional services set forth in Chapter 4.

C. REQUIREMENT FOR AN INDEPENDENT PEER REVIEWER - SC Code Ann §§ 11-35-2910(11), 3024(3)(b), and Regulation 1-445.2145(A)(7)

An Agency must retain an independent peer reviewer on each design-build project unless excused by the State Engineer. If the Agency desires to forego an independent peer reviewer, the Agency must submit to the State Engineer a written determination that considering the nature, size, and scope of the project, the Agency has personnel on staff qualified to perform the functions of the independent peer reviewer. The Agency must include the qualifications of the personnel who will perform the functions of the independent peer reviewer. The State Engineer will within 10 days of receipt of the Agency's determination, notify the Agency of his determination, in writing, whether to allow the Agency to forego an independent peer reviewer.

D. LICENSING AND BONDING REQUIREMENTS FOR DESIGN-BUILDERS – SC Code Ann §§ 40-11-10 et seq., §§ 11-35-3010 & 3037 and Regs 19-445.2145(C)

The design-builder must comply with all licensing requirements of the SC Department of Labor, Licensing and Regulation. The design-builder must provide a performance bond and a material and labor payment bond, both for 100% of the cost of design and construction.

The Agency may require one or more of the following forms of security to assure the timely, faithful, and uninterrupted provision of operations and maintenance services procured separately or as one element of another project delivery method:

1. Operations period surety bonds that secure the performance of the contractor's operations and maintenance obligations;
2. Letters of credit in an amount appropriate to cover the cost to the governmental body of preventing infrastructure service interruptions for a period up to twelve months; and
3. Appropriate written guarantees from the contractor, or depending upon the circumstances, from a parent corporation, to secure the recovery of re-procurement costs to the governmental body if the contractor defaults in performance."

E. ADVERTISING – SC Code Ann § 11-35-1530(2) & § 11-35-1520(3)

The Agency must advertise the solicitation in accordance with the solicitation plan included in the approved Selection Plan.

CF. PRE-PROPOSAL CONFERENCES – SC Code Ann Regs 19-445.2095(H)(1)

The Agency may conduct a pre-proposal conference to explain or clarify the solicitation and complicated specifications and requirements (e.g., proposal format) to interested firms. The Agency should use any such conference to eliminate misunderstandings that may arise from misinterpretation, complexity, errors, omissions, or other deficiencies.

When the Agency determines that a pre-proposal conference is in its best interest, the Agency must notify all firms receiving solicitations and advertise the conference in SCBO. The Agency must give adequate notice to prospective offerors so that all who wish to may arrange for representation. The notice must define as explicitly as possible the



nature and scope of the conference.

At the pre-proposal conference, the Agency must furnish all prospective offerors identical information in connection with the proposed acquisition. The Agency may not use remarks and explanations at the conference to modify or qualify the terms of the solicitation and specifications. If the Agency wishes to modify or qualify the terms of the solicitation and specifications, it must do so by written amendment. The Agency must make a complete record of the conference and make the record a part of its procurement file.

**6.2.112.1.10 NON-DISCLOSURE OF PROCUREMENT AND CONFIDENTIAL INFORMATION – SC Code Ann § 11-35-1530(3) and Regs 19-445.2010 & 2095(C)**

Prior to a contract award or posting of Notice of Award, personnel participating in the procurement process may not reveal source selection information to any unauthorized person. Anyone receiving a request for information before contract award or posting of Notice of Award must forward the request to the project manager. ~~(See SC Reg. 19-445.2010 and 19-445.2095C(1)).~~ Personnel participating in the procurement process may not reveal proprietary information submitted by offerors to any unauthorized person at any time. All personnel who participate in the procurement process must sign an agreement not to discuss or reveal information concerning the process except to an individual participating in the same proceeding, and then only to the extent that the information is required in connection with the proceedings.

A. “SOURCE SELECTION INFORMATION” ~~is information defined as such in SC Reg. 19-445.2010.~~ Source selection information includes information stored in electronic, magnetic, audio, or video formats, prepared or developed for use by the State to conduct a particular procurement. Source selection information is information that would jeopardize the integrity or successful completion of a particular procurement if someone were to disclose it to a competing contractor. Source selection information is required by statute, regulation or order to be secured in a procurement file or other facility to prevent disclosure. Source selection information is limited to the following:

1. Proposed costs or prices submitted in response to an Agency solicitation, or lists of those proposed costs or prices;
2. Source selection plans;
3. Technical evaluation plans;
4. Technical evaluations of proposals;
5. Cost or price evaluation of proposals;
6. Information regarding which proposals are determined to be reasonably susceptible of being selected for award;
7. Rankings of responses, proposals, or competitors;
8. Reports and evaluations of the selection committee; and
9. Other information based on a case-by-case determination of the Agency Head or OSE that its disclosure would jeopardize the integrity or successful completion of the procurement.

See SC Reg. 19-445.2010.

B. “PROPRIETARY INFORMATION” is any information submitted to the State by a contractor and designated as proprietary, in accordance with law or regulations, by the contractor. ~~(See SC Reg. 19-445.2095C(2).)~~

**6.2.1212.1.9 CONFLICTS OF INTEREST – SC Code Ann §§ 8-13-700, 725, 760, & 775**

~~Using Form SE-214 (Selection Committee Confidentiality and Conflict of Interest Policy), the Chair of the Selection Committee must instruct the committee members of the Procurement Code’s requirements for ethical conduct, and require each member to sign a statement that he has read and understands those standards of conduct and that he does not have an actual or apparent conflict of interest relating to the proposed acquisition. If an evaluator has an actual or apparent conflict of interest related to a proposal under evaluation, the Chair must remove that evaluator and, if a sufficient number of evaluators do not remain, replace him with another.~~

**12.1.11 POTENTIAL OFFEROR’S PARTICIPATION IN A REPORT OR STUDY USED IN PREPARATION OF DESIGN REQUIREMENTS – SC Code Ann § 11-35-3005(3)**



Participation in a report or study that is later used in the preparation of design requirements for a project does not disqualify a firm from participating as a member of a proposing team in a design-build, design-build-operate-maintain, or design-build-finance-operate-maintain procurement unless the participation provides the business with a substantial competitive advantage. In analyzing whether a member of a proposing teams participation in a report or study provides that team a significant advantage, one must consider the role the member will play on the team. Questions to consider are:

1. Is the team members position on the team significant enough that it will significantly influence the ranking of the team?
2. Did the team members participation in the report or study give the team member insight into the Agency's requirements that is not provided in the solicitation to all offerors and which could give the team an advantage in preparing its proposal?
3. Did the team members participation in the report or study give the team member or team the opportunity to start working on a proposal prior to the Agency soliciting statements of qualifications or proposals?
4. What would the average person on the street think if they knew the facts?

Of particular concern would be the situation where the lead member of the proposing team prepared the design requirements that will be used to evaluate proposals. An example of such a situation follows:

An Energy Savings Contractor (ESCO) prepares an energy audit for the Agency, which the Agency uses as the basis for its solicitation of a guaranteed energy savings contract. We will call this entity ESCO-A.

Any anticipated offeror will be submitted by an ESCO or a team led by an ESCO. Moreover, the Agency will select an offeror to be its guaranteed energy saving contractor primarily based on its (the ESCO's) qualifications and energy savings proposal. Under such a situation, ESCO-A will have a clear advantage. ESCO-A will have had an opportunity to develop an advantageous relationship with the Agency that may skew the rankings. ESCO-A will be in a position to start developing their proposal prior to the Agency ever soliciting proposals giving it more time to develop its proposal than any other offeror. Additionally, ESCO-A will have the opportunity to skew the energy audit and recommendations towards its strengths. Therefore, ESCO-A should not be allowed to compete for the guaranteed energy savings contract.

#### **6.2.1312.1.12 RECEIPT OF PROPOSALS - SC Code Ann Regs 19-445.2095(C) & 2045**

The Agency must time-stamp proposals and modifications upon receipt and hold them unopened (except as otherwise provided in the Procurement Regulations) in a secure place until the established due date.

#### **6.2.1412.1.13 REGISTER OF PROPOSALS AND PROPOSAL OPENING AND REGISTER OF PROPOSALS - SC Code Ann Regs. 19-445.2095(C)**

~~The Agency must receive, safeguard, open, and register proposals in accordance with the requirements of SC Reg. 19-445.2095(B) and (C). The Agency's project manager (or designee) must open the proposals publicly in the presence of one or more State witnesses at the time and place designated in the request for proposals. The person opening the proposals should declare the arrival of the time for receipt of proposals, give his/her name and the names of the witnesses, and record this information on a Register of Proposals. The Agency must prepare a Register of Proposals that identifies the project and includes the name of each offeror and the number of modifications received, if any. The person opening the proposals and the witness must certify the Register of Proposals in writing as true and accurate. The Agency may not make the Register of Proposals open to public inspection until after the issuance of an award or notification of intent to award, whichever is earlier. The Agency must not disclose the contents and the identity of competing offers during the process of opening proposals. If members of the public appear at the opening, the person opening the proposals should state that he/she will conduct the opening of proposals and recording of the names in silence to protect confidential information.~~



**6.2.1512.1.14 PERMISSIBLE COMMUNICATIONS WITH OFFERORS AFTER PROPOSAL OPENING BUT BEFORE AWARD – SC Code Ann §§ 11-35-1530(6) & (8)**

The Chief Procurement Officers have jointly published guidelines for communications with offerors after opening proposals but prior to award. Such discussions include ~~§ 11-35-1530(6)~~ clarification discussions and ~~§ 11-35-1530(8)~~ negotiations. This document also addresses ~~§ 11-35-1530(8)(c)~~ Best and Final Offers. The Agency will find this document posted on OSE's Web site. The Agency must conduct discussion and any BAFO process in accordance with these guidelines. The Agency will find a copy of the guidelines in Appendix D.

**6.2.1612.1.15 REJECTION OF INDIVIDUAL PROPOSALS AND CANCELLATION OF SOLICITATION – SC Code Ann § 11-35-1530(9) & 1710**

**A. REJECTION OF INDIVIDUAL PROPOSALS – SC Code Ann Regs 19-445.2095(J)**

~~SC Reg. 19-445.2095(J) provides the basis for rejection of individual proposals. Under this provision, the~~The Agency does not need to accept proposals unconditionally without alteration or correction, and to the extent otherwise allowed by law (see 6.2.1512.1.13 above), the State's stated requirements may be clarified after proposals are submitted. The Agency must consider this flexibility in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to the following:

1. The business that submitted the proposal is non-responsible as determined under Section 11-35-1810;
2. The proposal ultimately (that is, after an opportunity, if any is offered, has passed for altering or clarifying the proposal) fails to meet the announced requirements of the State in some material respect; or
3. The proposed price is clearly unreasonable.

The Agency must document the reasons for cancellation or rejection and make the documentation a part of the procurement file available for public inspection.

**B. REJECTION OF PROPOSALS – CANCELLATION OF SOLICITATION PRIOR TO AWARD – SC Code Ann Regs 19-445.2097**

Unless there is a compelling reason to reject all proposals, the Agency, after receiving and opening proposals, must award a contract. Subject to the provisions of SC Code Ann § 1530, this award must be to the highest ranked responsible offeror. Should the Agency decide to cancel a solicitation after opening proposals but before award, the Agency must determine in writing that:

- (1) inadequate or ambiguous specifications were cited in the solicitation;
- (2) specifications have been revised;
- (3) the supplies, services, information technology, or construction being procured are no longer required;
- (4) the solicitation did not provide for consideration of all factors of cost to the State, such as cost of transporting state furnished property to bidders' plants;
- (5) proposals received indicate that the needs of the State can be satisfied by a less expensive article differing from that on which the proposals were requested;
- (6) all otherwise acceptable proposals received are at unreasonable prices;
- (7) the proposals were not independently arrived at in open competition, were collusive, or were submitted in bad faith; or
- (8) for other reasons, cancellation is clearly in the best interest of the State.

If the determination is due to a change in requirements, the Agency must show in its determination that prior to opening, it made every effort to anticipate changes in requirements. Any determination to cancel the solicitation must be made in good faith (honesty in fact, fair dealing). SC Code Ann § 11-35-30, See **In Re: Protest of Wometco Food Services, Inc.** SCPD 1991-14

**6.2.1712.1.16 RANKING OF PROPOSALS**

**A. RANKING BY INDIVIDUAL COMMITTEE MEMBERS**



Each member of the selection committee must examine each proposal in detail to measure its contents against the established standards for evaluation factors, and assign a score, numerical or otherwise, to each factor. Because numerical scores or other types of grading may not convey fully the individual evaluator's judgment of some aspects of the proposal, each evaluator must supplement each rating with a concise narrative evaluation that includes a discussion and interpretation of the limitations of the rating. The narrative should summarize the strong and weak points of each proposal recording what the contractor offered and how the offer met the established requirements, and it summarizes the strong and weak points of what the contractor has proposed. In instances where the contractor has failed to meet a critical requirement, the evaluator assesses what should be done to remedy the deficiency and what the impact of the deficiency (corrected or uncorrected) is on the overall proposal. Each committee member must turn his/her signed evaluation and narrative into the committee chair with a copy to the Agency project manager.

#### B. CONSENSUS OF SELECTION COMMITTEE

The Selection Committee assigns the final score or ranking for each technical proposal by consensus. After the individual members have separately evaluated the proposals, including preparation of their narrative explanations, the Selection Committee must meet and formulate its collective conclusions. The committee must discuss significant variations in evaluators' scores or assessments of technical merit and resolve discrepancies or fully explain them in the record. The Agency project manager must prepare for the committee's approval, a narrative justification to the final score or ranking the committee assigns to each proposal. This narrative justification must demonstrate that the Committee based its final selection on an intelligent and rational judgment of the technical merits of each competing proposal. The committee must attach a narrative justification to the final score or ranking it assigns to each proposal. ~~to demonstrate that the Committee based its final selection on an intelligent and rational judgment of the technical merits of each competing proposal.~~

#### C. SELECTION COMMITTEE REPORT AND RECOMMENDATION

After the Selection Committee evaluates the proposals, the Agency project manager must prepare a report to the Agency Head. The Chair and each Committee member must sign the report. The report must rank each offeror's proposal from the most advantageous to the least advantageous. For each offeror, the report should provide the final score and a summary analysis of each proposal including an assessment of the offeror's compliance with the requirements of the solicitation, any changes to the technical evaluation scores and a narrative to support the changes. The report must include the Committee's recommendation regarding the source(s) the Agency should select for award or negotiation. The Committee must support a recommendation to award to or negotiate with a higher priced, higher scored offeror with a written finding that the technical superiority of the higher priced offer relative to other offers, warrants the additional cost. The Committee must document the rationale for the finding of technical superiority in detail. Unsupported conclusory statements are not acceptable. The report must include a cover page to the report identifying the procurement and including the names and signatures of the Committee members.

#### **6.2.1812.1.17 AWARD IF PRICE AN INITIAL EVALUATION FACTOR - SC Code Ann § 11-35-1530(9)**

If price is an initial evaluation factor in the RFP, the Agency must, (subject to Part ~~6.2.2112.1.21~~ below) award to offeror whose offer the Selection Committee determines to be most advantageous to the Agency, taking into consideration price and the evaluation factors set forth in the RFP. See SC Code § 11-35-1530(9). However, the Agency may in lieu of the forgoing, determine to utilize one of the options provided in SC Code § 11-35-1530(8). (Parts ~~6.2.1912.1.18~~ and ~~6.2.2012.1.19~~)

#### **6.2.1912.1.18 NEGOTIATIONS AFTER EVALUATION AND RANKING**

See ~~6.2.1512.1.14~~ above and Appendix D.

#### **6.2.2012.1.19 BEST AND FINAL OFFERS (BAFO)**

See ~~6.2.1512.1.14~~ above and Appendix D.

#### **6.2.2112.1.20 AWARD**



The Agency Head or its governing body typically makes the final selection decision. The Agency Head or its governing body may not overturn the Selection Committee's decision unless they determine in writing that there is no rational basis for the Committee's decision, the Committee did not follow the RFP evaluation factors, or the Committee exercised its discretion in an arbitrary or capricious manner. If the Agency Head or its governing body decides to reject the Committee's selection decision, the Agency must cancel the procurement action and start a new procurement process. If the Agency rejects the decision of the committee and chooses to cancel the procurement, the agency must comply with the requirements Part 12.1.15(B). See SC Code Ann. § 11-35-1710 and Regs. 19-445.2097.

After the Agency Head approves the award, the Project Manager may submit the proposed contract, with supporting documentation, to OSE for review and approval.

#### **12.1.21 NOTICE OF AWARD**

##### **A. REQUIREMENT OF POSTING – SC Code Ann § 11-35-1530(9) & § 1520(10)**

Once the Agency selection is final, it must post a Notice of Award (SE-370) OF a contract to the selected offeror. The Agency must post the Notice at the time and in the location announced in the RFP. The Agency must also promptly mail a copy of the notice each responsive offeror. If an Agency is unable to confirm intent to award on the posting date announced at the RFP, it must post a notice on that date at the specified location stating the new date the Agency will post the Notice (SE-370).

##### **B. OSE CONCURRENCE WITH POSTING - SC Code Ann §§ 11-35-510 and 11-35-830**

OSE must concur in the posting of Notice of Award a contract. If not already provided, the Agency must provide OSE with a copy of the proposed Notice of Award, proposed contract, and Selection Committee report with supporting documentation. The Agency must make this submittal using Form SE-360. This submittal must be made after the Selection Committee's final selection and completion of negotiations. However, the Agency may submit its request to OSE pending final approval of the proposed contract by the Agencies governing board or Agency Head.

OSE will have five working days from the date of receipt of the SE-360 and all required documentation to notify the Agency of any defect in their documentation or, based on that documentation, any apparent defect in their selection procedures. If the Agency does not receive an objection from OSE within five working days from the date OSE receives the SE-360 and all required documentation, OSE will be deemed to have granted approval for the Agency to post the Notice of Award. To expedite this process, the Agency must email the OSE Project Manager, State Engineer, OSE administrative assistant PDF copies of the SE-360 and all required documentation. In lieu of email, the Agency may FAX the SE-360 and required documentation or send them by the US Postal Service. In case of a FAX or delivery by the Postal Service, the Agency only needs to copy the State Engineer, and OSE administrative assistant with the Form SE-360.

**Note:** the requirement for a copy to the State Engineer and administrative assistant is to expedite the process in the event the OSE project manager is out of the office.

#### **12.1.22 CONTRACT EXECUTION WAITING PERIOD - SC Code Ann §§ 11-35-3020(c)(ii) & 11-35-4210(1)(b)**

The Agency must wait eleven days after posting the Notice of Award before it may execute a contract with selected offeror. During this time, any offeror who disagrees with the Agency's decision may protest the contract award. If the State Engineer receives such a protest in writing during this period, the Agency may execute a contract until the matter is resolved unless the Agency in accordance with the Procurement Code request a lifting of the stay and CPOC grants the request. See SC Code Ann § 11-35-4210(7). If the State Engineer does not receive any protests, the Agency may execute a contract on the eleventh day after posting the Notice of Award.

#### **12.1.23 SUBMITTING THE CONTRACT TO CONTRACTOR FOR EXECUTION**

Once all conditions precedent to executing a contract have occurred, the Agency should submit an unsigned copy of the contract to the contractor with a cover letter requiring the contractor to execute the contract and return the original contract along with the following documents to the Agency within fourteen days:



1. Certificates of insurance in the form of the latest edition of the ACORD 25S showing that the Contractor has in place for the project. Insurance meeting the requirements of the RFP;
2. The performance bond, SE-355; and
3. The labor and material payment bond, SE-357.

#### **12.1.24 REVIEWING CERTIFICATE OF INSURANCE AND PERFORMANCE AND PAYMENT BONDS** **- SC Code Ann §§ 11-35-830, 11-35-3030(3) & 29-6-250 and Regs 19-445.2145(C)(2)**

After receiving the certificates of insurance and performance and payment bonds from the contractor, the Agency should review them to determine that they are authentic and meet the requirements of the Procurement Code and Regulations. The Agency is responsible to assure that it has the required labor and material payment bond in place before permitting the contractor to start work. See Sloan Const. Co., Inc., v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158 (2008). Failure to do so could make the Agency liable for the contractor's failure to pay its subcontractor's and suppliers. OSE has published a Surety Bond Review Guide to assist the Agency in fulfilling this obligation.

#### **6.2.22-12.1.25 SELECTION RECORDS - SC Code Ann § 11-35-2430 and Regs 19-445.2005(B)**

The Agency should retain all documents and records the Agency generates or receives related to the procurement at the organization level of generation until the Agency makes the selection decision. -Then, the Agency should collect all records relating to the source selection effort and forward them to the Agency procurement office for inclusion in the official contract file. At a minimum, the Agency must retain the following records in its procurement file:

1. Request to procure by the RFP method, with OSE authorization;
2. Agency Selection Plan;
3. Plan approval documents with any directed changes;
4. All orders or other documentation establishing membership on the Selection Committee and delegation of duties (e.g. Agency Head);
5. Records of attendance and a summary of proceedings of pre-solicitation and pre-proposal conferences;
6. RFP with amendments;
7. All proposals;
8. The Selection Committee's classification report;
9. The reason for rejecting any offer as not acceptable;
10. Records of discussions with and responses from offerors during the discussion process outlined in Part 6.2.1512.1.14;
11. Modifications to proposals resulting from discussions;
12. Best and final offers;
13. The Selection Committee report with rankings and recommendations;
14. Agency Heads memorandums and instructions to the Selection Committee and project manager;
15. Agency Head or governing body's decision regarding recommendations for source selection; and
16. Any other data or documents related to the selection process.

#### **6.2.23-12.1.26 NOTIFICATION OF UNSUCCESSFUL OFFERORS**

PRIOR TO NOTICE OF AWARD: During the selection process, theThe Agency must provide prompt notification of its selection decision to all unsuccessful offerors. -When the Selection Committee determines that an offeror's proposal is not acceptable, the Agency must notify the offeror of the basis of the determination in general terms and advise the offeror that it will not consider a revision to the proposal. -Following completion of negotiations, the Agency shall post a Notice of Intent to Award as required in §11-35-1520(10) of the Code. Such notice must not be in the form of a blanket notice to all offerors but must be an individual notice tailored to each offeror. Each individual notice must not apprise the offeror of the status of any other offeror's proposal.

AFTER NOTICE OF AWARD: When the Agency awards a contract for construction on a basis other than price alone, the Agency must furnish the basis for the selection decision and contract award to unsuccessful offerors upon their written request. The Agency should provide unsuccessful offerors with a debriefing upon request.